MENT & 8 ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CRIMINAL REVISION NO. 43-23-93]
3 DECEMBER 1993

CRIMINAL REVISION: Charge of illegal fishing in Malaysian fisheries waters - Fisheries Act 1985 - Thai nationals - Magistrate imposed bail after acquitting applicants - Section 311 Criminal Procedure Code - Whether Magistrate acted beyond the provisions of the law.

STATUTORY INTERPRETATION: Construction of penal sections - Principles to be applied - Section 311 Criminal Procedure Code - Imposition of bail bond - Whether s. 311 applicable to situations where accused had been acquitted - Whether "order" in s. 311 included an order of acquittal.

The applicants in this case are Thai nationals who were charged and acquitted on a charge under s. 15(1)(a), Fisheries Act 1985, for illegal fishing in Malaysian fisheries waters. The learned Magistrate, after acquitting the applicants, made an order under s. 311 of the Criminal Procedure Code (CPC) for the applicants to be released on bail and in default to be committed to prison pending disposal of the appeal to the High Court.

The applicants applied for a review of the learned Magistrate's decision on the ground that she had erred in law in imposing bail under s. 311 thereof, as that section did not apply to situations where persons charged had been acquitted of the charge. The learned Deputy Public Prosecutor contended that the word "order" in s. 311 included an order of acquittal and therefore the applicants were legally admitted to bail. In any case application was submitted by the learned Deputy under s. 315 CPC for the issue of a warrant by the Court directing that the applicants be committed to prison or admitted to bail pending disposal of the appeal.

Held:

[1] There is nothing in s. 311 of the CPC or in any other provisions of the Code that confers on the learned Magistrate the jurisdiction to admit the applicants to bail after making an order for their acquittal. The order of the learned Magistrate admitting the applicants to bail is illegal and in so ordering the learned Magistrate had acted outside the scope and ambit of her jurisdiction as a Magistrate.

[2] Acts and laws imposing criminal or other penalties should be clear and unambigious and should be construed narrowly in favour of the persons proceeded against. The signification of the words "for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgement, order" appearing in s. 311 of the Code cannot be overlooked as the expression clearly showed that the legislature did not intend the word "order" to include an order of acquittal. An order of acquittal does not impose any obligation or entail the suffering of any punishment.

[3] As the applicants are Thai nationals and as the charge against them affects the national interest of this country, sufficient special circumstances exist to enable the Court to exercise its discretion under s. 315 of the CPC in favour of the Public Prosecutor and to admit the applicants to bail pending disposal of the appeal against the decision of the learned Magistrate.

[Bail bond under s. 311 CPC set aside and subsituted with bail bond under s. 315 CPC. Bail bond in respect of fishing vessel by learned Magistrate affirmed].

Cases referred to:

Woodward v. Watts [1853] 2 E & B 452 ***(refd)***
Rivers Wear Comrs v. Adamson [1874-80] AER Rep 1 at 12 ***(refd)***
Re Norman [1986] 16 QBD 673
Smith Kline & French Laboratories Ltd. v. Salim (Malaysia) Sdn. Bhd. [1989] 2 MLJ 380, 382 ***(refd)***
Duport Steels Ltd. v. Sirs [1980] 1 AER 529, 541 ***(refd)***
PP v. Chu Beow Hin Hin [1982] 1 MLJ 135 ***(refd)***
Attorney-General v. H.R.H. Prince Ernest of Hanover [1957] 1 AER 49, 55 ***(refd)***
London & County Commercial Properties Investments Ltd. v. Att.-General [1953] 1 WLR 312 @ 319 (refd)
Tuck & Sons v. Priester [1887] 19 QBD 629, at p. 638 ***(refd)***
Re H.P.C. Productions, Ltd. [1962] Ch. 466, at p. 485 ***(refd)***
Tan Kheng Teong & Anor. v. Public Prosecutor [1992] 2 CLJ 1273 ***(refd)***
Chu Beow Hin v. PP [1981] 2 MLJ 85 ***(refd)***
Manson v. Duke of Westminister & Ors. [1981] 2 AER 40 ***(cit)***
River Wear Comrs v. Adamson [1874-80] AER Rep. 1 @ 12 ***(cit)***
A.G. & Board of Education v. West Riding of Yorkshiren, Exp Grenside [1907] AC 29 ***(cit)***

R v. Mansel Jones [1989] 23 QBD 29 ***(cit)***
Arifin Credit Malaysia Sdn. Bhd. v. Yap Yuen Fui [1984] 1 CLJ 150 ***(cit)***
Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. [1993] 3 MLJ 265 ***(cit)***
Tan Tee v. R [1948] MLJ 153 ***(dist)***
Re Kwan Wah Yip [1954] MLJ 146 ***(dist)***
Suhaili bin Haji Chuchu v. Public Prosecutor [1983] 2 MLJ 424 ***(dist)***
Ganesan v. Public Prosecutor [1983] 2 MLJ 369 ***(dist)***
Re V.G.M. Holdings Ltd. [1941] 3 AER 417

Legislation referred to:
Criminal Procedure Code, ss. 311, 315, 323(i)
Fisheries Act 1985, ss. 15(1)(a), 25(a)

Other sources referred to:
Interpretation of Statutes, Maxwell, 12th Edn., pp. 1, 2, 239, 240

For the applicants - V.M. Ravindran (M. Athimulan with him); M/s. M. Ravi & Co.
For the respondent - Ahmad Shahrir, DPP

JUDGMENT

Vincent Ng Kim Khoay JC:
The nine applicants herein ("the applicants") who are Thai nationals were charged and acquitted in the Magistrate Court on the following charge:

> Bahawa kamu semua pada 9 Januari 1993, jam lebih kurang 12.10 tengahari, di dalam vesel penangkapan ikan asing yang bernama Thwilap 21, dikedudukan Lat 05 degree 07.64' Utara dan Long 99 degree 14.89' Timur, jarak 60.00 batu nautikal dari Pulau Pinang, di dalam negeri Pulau Pinang, di perairan Perikanan Malaysia, telah didapati menangkap ikan tanpa kebenaran perjanjian antara kerajaan Malaysia, dan Permit dari Ketua Pengarah Perikanan Malaysia, maka dengan ini kamu semua telah melakukan kesalahan di bawah s. 15(1)(a), Akta Perikanan 1985 dan boleh dihukum dibawah s. 25(a), Akta yang sama.

The applicants have now applied to this Court under s. 323(i) of the Criminal Procedure Code to review the decision of the learned Magistrate who, on 18 November 1993, after acquitting the applicants of the said charge had made an order under s. 311 of the Criminal Procedure Code, upon application of the Prosecuting Officer for all the applicants to be released on bail of RM6,000 each with one local surety or, and in default, to be committed to prison pending the disposal of the appeal to the High Court (the bail order).

The ground advanced by Counsel for the applicants, Mr. V.M. Ravindran, is that when the learned Magistrate made the bail order, she had clearly acted beyond the provisions of the law, as the provision for stay of execution pending appeal under s. 311 of the Criminal Procedure Code is not intended to encompass within its ambit, a situation where persons charged are acquitted of the charge.

Obviously, the issue for judicial interpretation would turn on the proper construction of s. 311 of the Criminal Procedure Code, which states as follows:

> Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment, **order**, conviction or sentence pending appeal, on such terms as to security **for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order**, conviction or sentence as to the Court below or to such Judge may seem reasonable.

There is a welter of authorities on the principles of law governing the construction of statutes, which decided as follows:

(a) Words in an Act of Parliament are to bear the natural and grammatical construction, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification. Thus justifying the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear. See *Woodward v.Watts* [1853] 2 E & B 452 read with *Rivers Wear Comrs v.Adamson* [1874-80] AER Rep 1 at 12.
(b) Judges are to construe Acts and not to legislate, and the legislature to provide a remedy when one is wanted.
(c) The Court has no authority to limit a statute or to put upon the words of a statute a limitation which is not according to the ordinary meaning of the words. See *Re Norman* [1986] 16 QBD 673.
(d) A statute should not be read to give it an effect such that it is a pointless piece of

legislation. See *Smith Kline & French Laboratiores Ltd v. Salim (Malavsia) Sdn. Bhd.* [1989] 2 MLJ 380, 382.

(e) All that the Court has to do is to consider the plain meaning of the Statute.

(f) Where the meaning of the words in the statute is plain and unambiguous, Judges should not invent fancy ambiguities. See *Duport Steels Ltd v. Sirs* [1980] 1 AER 529, 541.

(g) The Court must give effect to the clear and explicit language of the enacting words of the subsection. It cannot disregard them unless it is apparent that some other meaning is intended. See *P.P. vs Chu Beow Hin Hin* [1982] 1 MLJ 135. It must often be difficult to say that any terms [of a statute] are clear and unambiguous until they have been studied in their context. See *Attorney-General v. H.R.H. Prince Ernest of Hanover* [1957] 1 AER 49, 55.

(h) The first task of the Court is to find out the intention of Parliament and the words of a statute speak the intention of the Legislature. And in so doing, it must bear in mind that its function is jus dicere, not jus dare: the words of a statute must not be overruled by judges, but reform of the law must be left in the hands of Parliament. See **Maxwell on Interpretation of Statutes**, 12th Edn. pp. 1, 2.

(i) Acts imposing criminal or other penalties should be clear and unambiguous and should be construed narrowly in favour of the person proceeded against. **Maxwell on Interpretation of Statutes**, 12th Edn., at pp. 239 and 240 states the settled rule for the construction of penal sections as follows:

> The principle applied in construing a penal Act is that if, in construing the relevant provisions, 'there appears any reasonable doubt or ambiguity', it will be resolved in favour of the person who would be liable to the penalty. Per Upjohn J. in *London & County Commercial Properties Investments, Ltd. v. Att.-General* [1953] 1 WLR 312 @ 319.
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> If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections. Per Lord Esher MR in *Tuck & Sons v. Priester* [1887] 19 QBD 629, at p. 638.
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> If the language of the statute 18 equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted. The Court must always see that the person to be penalised comes fairly and squarely with in the plain words of the enactment. Per Plowman J. in *Re H.P.C. Productions, Ltd.* [1962] Ch 466, at p. 485.
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> The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction. See *Tan Kheng Teong & Anor. v. Public Prosecutor* [1992] 2 CLJ 1273 and *Chu Beow Hin v. PP* [1981] 2 MLJ 85.

The other authorities on Interpretation of Statutes are as follows:

Manson v. Duke of Westminister & Ors. [1981] 2 AER 40

River Wear Comrs v. Adamson [1874-80] AER Rep. 1 @ 12

A.G. & Board of Education v. West Riding of Yorkshire, Ex P Grenside [1907] AC 29

R v. Mansel Jones [1989] 23 QBD 29

Arifin Credit Malaysia Sdn.Bhd. v. Yap Yuen Fui [1984] 1 CLJ 150

Lee Gee Lam vs Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1993] 3 MLJ 265

Applying the principles for the construction of penal provisions adumbrated above, it is settled law that whatever laws affecting the liberty of an individual - irrespective of whether he or she is a subject of State or not - has to be unambiguous and clearly expressed in order to deprive such person of his or her liberty.

The judgement of acquittal by the lower Court does not become non-est by the mere fact of the filing of appeal against it in the High Court. The presumption as to innocence of the accused stands fortified on his acquittal by the trial Court. The judgment under appeal acquitting the accused stands till it is reversed (if at all by

a superior Court). The existence of the operation of such a judgment cannot be lost sight of.

An order admitting the applicants to bail pending disposal of their appeal has the effect of committing them to prison pending the disposal of the appeal, in the event of their default in raising the bail amount. Such an order by the learned Magistrate is clearly illegal unless there is unambiguous conferment of this jurisdiction in s. 311 of the Criminal Procedure Code or in any other provisions.

The learned Deputy Public Prosecutor has submitted that the word "order" in s. 311 (as underscored above) of the Code should include an order for acquittal, and if so, it would empower the Magistrate to make the said bail order against the applicants under s. 311 of the Code, upon their acquittal. This, I do not agree, as, not only there is no clear provision in s. 311 or in other provisions of the Code, to impose such penalties on the applicants - as required under the principles adumbrated above - but, on the contrary, the signification of the words (also underscored) "for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, ..." in s. 311, cannot be overlooked and such expression clearly showed that the legislature did not intend the word "order" to include an order of acquittal. Surely, it is beyond question that an order of acquittal does not impose any obligation or entail the suffering of any punishment.

The four Malaysian cases cited by the learned DPP being *Tan Tee v. R* [1948] MLJ 153, *Re Kwan Wah Yip* [1954] MLJ 146, *Suhaili bin Haji Chuchu v. Public Prosecutor* [1983] 2 MLJ 424 and *Ganesan v. Public Prosecutor* [1983] 2 MLJ 369 are irrelevant and inapplicable to the current case as all of them concerned the application for a stay under s. 311 (and s. 279 - in *Suhaili's* case) of the Code following a **conviction** and not an acquittal of the respective defendants. In her authoritative work **"Criminal Procedure in Malaysia"** at p. 361, Mimi Kamariah Majid was clearly of the view that s. 311 deals only with the stay of execution of sentence.

Thus, I hereby order that the lower Court's order in respect of bail bond on the applicants be set aside, as she was not only *functus officio* (see *Re V.G.M. Holdinas Ltd.* [1941] 3 AER 417 but had acted outside the scope and ambit of her jurisdiction as a Magistrate.

The learned DPP has now applied under s. 315 of the CPC to this Court to issue a warrant directing that the accused be committed to prison or admitted to bail pending disposal of the appeal. It is in the discretion of the High Court to exercise the power under the section. This section is meant not for the protection of the accused but to ensure that the accused against whom an appeal has been filed would not abscond during the pendency of the appeal.

The provision under s. 315 of the Code makes for practical sense as the Judge hearing the application under this provision is also cloathed with inherent powers to order an early hearing of the appeal, expeditious completion of the record of appeal and even to fix a date for prompt disposal of the appeal itself in the event that such discretion is exercised by the Judge.

However, in view of the long period usually taken for the disposal of appeal (unless otherwise ordered) thereby causing hardship to the defendant or accused, in whose favour the presumption of innocence stands fortified by the acquittal by the trial Court, the High Court in exercising its jurisdiction under s. 315 of the CPC has to bear in mind the following:

(a) The provisions of s. 315 also exhibit an intention of the legislature that the grant of bail is the rule and committal to prison without bail is an exception.
(b) The discretion in favour of the prosecution is exercised only sparingly and upon being satisfied that there are special circumstances to move the Court.
(c) The quantum of bail set should be realistic and should not be such as to have the effect of depriving the person, who stands acquitted of the charge, of his liberty.
(d) The mere fact of an admission of appeal to the High Court from the decision of the Magistrate's Court does not by itself constitute special circumstances.
(e) It is desirable to also order an early hearing of the appeal itself should the Courts discretion under this section be exercised.

In this case though the Court has been informed by Counsel that the applicants have been in remand for a period of about eleven months covering the period pending and subsequent to

the trial in the Magistrate Court, yet it is this Court's view that because the applicants are Thai nationals and the charge against them was, to wit, fishing illegally in Malaysian waters - which activity affects the national interests of Malaysia - these two factors would constitute sufficient special circumstances and grounds to enable it to exercise of its discretion under s. 315 of the Criminal Procedure Code in favour of the Public Prosecutor. In the event, the DPP's application under this provision is allowed and I order that the applicants be admitted to bail at RM1,500 each in two local sureties, and in default, a warrant be issued committing the applicants to prison until the disposal of the DPP's appeal against the acquittal decision of the learned Magistrate. I also order that an early date be fixed for the hearing of the appeal and that the record of appeal be made ready to this Court as soon as possible. As applied, I further order that a bail bond in respect of the fishing vessel (P2) in the same quantum value and upon the same terms set by the learned Magistrate, be furnished by the applicants.

NG NEOH HA & 4 ORS.

v.

MANIAM S/O SUPPIAH & 5 ORS.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 22-41-1991]
11 DECEMBER 1993

PRACTICE & PROCEDURE: Submission of no case to answer and electing not to call evidence - Effect of it - Any difference if there is more than one defendant - Courts general view in such cases.

On 8 May 1980 at about 7.00 p.m. a collision took place between a car, a motor lorry and a motor bus along the Kuala Nerang - Alor Setar road. The car was proceeding towards Alor Setar and the lorry in the opposite direction and the motor bus was parked along the same side of the road on which the car was proceeding. The plaintiffs claimed that the accident was caused by the negligence of the 1st defendant, the driver of the motor lorry or, alternatively, by the negligence of the 5th defendant, the driver of the motor bus, in that he had permitted the bus to become an obstruction and a danger to persons lawfully using the road when he left it there stationary without proper or adequate warning. The drivers of the three vehicles denied liability and pleaded that the collision was jointly or severally caused or substantially contributed to by the drivers of the two vehicles.

At the end of the plaintiffs' case, Counsel for the driver and the owner of the bus submitted that her clients have no case to answer and elected not to call evidence.

Held:

[1] A single defendant will not be permitted to advance a submission at the close of the plaintiff's case that there is no case to answer unless an election is first made to call no evidence. Where that course is taken, the Judge's decision is made on the basis of all evidence that is to be called. Whichever way the Judge decides, the decision is dispositive of the issues being tried between the plaintiff and defendant in that action. Where a defendant is permitted to submit that there is no case to answer without being required to elect to call no evidence, then the Judge's decision is dispositive of the case only if the submission is upheld. If the submission is